APR 21 1981

Pet. No. 80-1500

SUPREME COURT OF THE UNITED STATES
October Term 1980

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GEORGE CLIPPER, Petitioner,

v.

GRANT A. STARKEY
And
NATIONAL PERMANENT
SAVINGS AND LOAN ASSOCIATION,

Respondents.

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On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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# BRIEF IN OPPOSITION

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April 20, 1981

## QUESTIONS PRESENTED FOR REVIEW

1. When a municipal police officer obtains a valid warrant and arrests and confines an innocent person under that warrant, is the alleged negligence of the officer and his witnesses during the pre-warrant and confinement stages actionable under §1985 as a conspiracy to deprive the innocent person of his civil rights?

2. When a plaintiff in a diversity case alleges separate causes of action based upon State common law torts of false arrest, false imprisonment and malicious prosecution, both substantively and as the basis for civil rights claims, is the United States District Court authorized, under §1988, to permit that plaintiff to "take the benefits of ... State law without its detriments to aid in expanding the federal remedy?"

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents National Permanent Federal Savings and Loan Association (National Permanent) and Grant A. Starkey (Starkey) deny Petitioner's contention that he sought relief under 42 U.S.C. §1986. That was not cited in either complaint, nor was it mentioned during the trial. More-

over, no such action could have been sustained by the District Court because neither complaint was filed within one year after the alleged cause of action accrued.

Respondent National Permanent also denies Petitioner's statement that his clain against it involved 42 U.S.C. §1983. Petitioner voluntarily abandoned that claim prior to the Trial Judge's initial decision on National Permanent's Motion for Summary Judgment (App. 19).

## STATEMENT OF THE CASE

The Respondents are not dissatisfied with the Petitioner's description of the proceedings below, except for the statement that the Petitioner sought recovery for willful and negligent wrongs. Neither complaint alleged a cause of action grounded upon negligence.

With respect to the facts, the Respondents adopt the facts set forth in the per

curiam opinion of the United States Court of Appeals for the Fourth Circuit (App. 1-5).

## ARGUMENT

1. WHEN A POLICE OFFICER OBTAINS A VALID WARRANT AND ARRESTS AND CONFINES AN INNOCENT PERSON UNDER THAT WARRANT, THE ALLEGED NEGLIGENCE OF THE OFFICER AND HIS WITNESSES DURING THE PRE-WARRANT AND CONFINEMENT STAGES IS NOT ACTIONABLE UNDER §1985 AS A CONSPIRACY TO DEPRIVE THE INNOCENT PERSON OF HIS CIVIL RIGHTS.

Were the instant case to be tried today, the alleged negligence of Respondent Starkey could not be the basis for a claim against him under §1982.[1] That precise issue was decided in Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689 (1979), wherein the Court said at page 2695 that the negligent detention of an innocent person for three

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1 At the trial in 1976, the jury found in favor of Respondent Starkey on the Petitioner's claim under §1983 that there was no probable cause for the arrest and, therefore, his constitutional rights were violated (App. 93-98).

days after his arrest pursuant to a facially valid warrant would not give rise to a claim under §1983 because the statute imposes liability for the deprivation of constitutional rights and the Constitution "does not guarantee that only the guilty will be arrested."

The rationale of Baker v. McCollan, supra, applies equally to the Petitioner's claim that he is entitled to recover under §1985(3), because the Respondents negligently conspired to arrest and detain him. Even assuming that human beings are capable of conspiring negligently, the conspiracy must be for the purpose of depriving an individual of constitutional rights before it gives rise to a separate claim under the civil rights conspiracy statute.

2. WHEN A PLAINTIFF IN A DIVERSITY CASE ALLEGES SEPARATE CAUSES OF ACTION BASED UPON STATE COMMON LAW TORTS OF FALSE ARREST, FALSE IMPRISONMENT AND MALICIOUS

PROSECUTION, BOTH SUBSTANTIVELY AND AS THE BASIS FOR CIVIL RIGHTS CLAIMS, THE UNITED STATES DISTRICT COURT MAY NOT, UNDER §1988, ALLOW THAT PLAINTIFF TO TAKE THE BENEFITS OF STATE LAW WITHOUT ITS DETRIMENTS TO AID IN EXPANDING THE FEDERAL REMEDY.

The Trial Judge correctly held that whenever an arrest is made pursuant to a valid warrant, under the law of Maryland a defendant cannot be liable for false arrest or false imprisonment, both being the same tort at common law. In that situation, a plaintiff who contends that there was no probable cause for his arrest and confinement may recover only for malicious prosecution.

The Petitioner argues that by the simple expedient of alleging that his arrest also was an act in furtherance of a civil rights conspiracy, the United States District Court was empowered under §1988 to disregard the State's interpretation of its common law and to find, as a matter of law,

that the existence of the valid warrant did not bar recovery for false arrest and false imprisonment. Petitioner contends that this should be allowed in order to "expand" the federal remedy.

This argument ignores the unambiguous language of §1988, which provides that whenever federal civil rights laws are deficient, the common law of the State shall govern unless the common law is inconsistent with the Constitution and laws of the United States. Petitioner has suggested no such inconsistency with respect to the law of Maryland on false arrest and false imprisonment because, Respondents submit, no inconsistency exists.

## CONCLUSION

The Petition for writ of certiorari to the United States Court of

Appeals for the Fourth Circuit should be denied.

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CERTIFICATE OF SERVICE

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This is to certify that 3 copies of the Brief in Opposition were mailed, with first class postage prepaid, this 20th day of April, 1981 to the following counsel of record in the cause below:

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